Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,
a Limited Partnership, dba Carson Harbor
Village Mobile Home Park,

Petitioner,

v.

CITY OF CARSON, a Municipal Corporation;
CARSON CITY MOBILEHOME PARK
RENTAL REVIEW BOARD; and CARSON HARBOR
VILLAGE MOBILEHOME PARK HOMEOWNERS
ASSOCIATION, Real Party in Interest,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID SPANGENBERG
Of Counsel
Law Office of David Spangenberg
420 Hudson Street, Suite A
Healdsburg, California 95448
Telephone: (707) 473-4340
Facsimile: (707) 473-0656

R. S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

QUESTIONS PRESENTED

This case involves a regulatory takings claim brought under the Fifth Amendment and 42 U.S.C. § 1983. The Ninth Circuit Court of Appeals ruled that the claim was not ripe for federal adjudication because Petitioner had not attempted to obtain just compensation through state procedures, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. The questions presented are:

1. Whether the court of appeals erred in holding—contrary to the rule of the Fourth, Fifth, Seventh, and Eleventh Circuits—that Petitioner must ripen its Fifth Amendment takings claim by first pursuing just compensation in the California state courts, when the courts of that state have previously denied compensation in factually indistinguishable cases, and the state's supreme court has held that inverse condemnation is not available for this class of takings claims?

2. Whether the court below erred in holding that *Williamson County* requires Petitioner to ripen its Fifth Amendment takings claim by pursuing state procedures that cannot lead to payment of just compensation by the government, but hold out the untested prospect of obtaining offsetting revenues from private third parties who were in no way responsible for the government's confiscatory actions?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carson Harbor Village, Ltd. (CHV), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on January 2, 2004.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004), and is reproduced as Appendix (App.) A. The Order of the court of appeals denying CHV's petition for rehearing and for rehearing en banc is unreported and is reproduced as Appendix C. The Order of the United States District Court for the Central District of California is unreported and is reproduced as Appendix B.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals which is the subject of this petition was filed and entered on January 2, 2004. App. A. The order of the Ninth Circuit denying CHV's petition for rehearing was entered on March 22, 2004. App. C. A 30-day extension of time to file this petition was granted by this Court on May 17, 2004. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

The City of Carson's Mobilehome Space Rent Control Ordinance, as codified at Chapter 7 of the Carson Municipal Code, is reproduced as Appendix D.

STATEMENT OF THE CASE

Under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), plaintiffs who have suffered an uncompensated taking of property may not assert their Fifth Amendment rights in federal court until they have pursued just compensation through state procedures—provided that such procedures are *available* and *adequate*. *Id.* at 194-95 (emphasis added). This case presents the issue of state compensation procedures so attenuated and roundabout that they cannot in good conscience be deemed an *adequate* remedy for a taking within the meaning of *Williamson County*, if indeed such procedures can be construed to make a compensation remedy *available* at all.

CHV owns and operates the Carson Harbor Village Mobile Home Park in the City of Carson (City). The City's Mobilehome Space Rent Control Ordinance (Ordinance) restricts the rent CHV may charge tenants for occupying spaces in its park. The Ordinance initially fixed rents in the park in 1979, and does not provide for automatic rent increases to account for inflation.

In June, 2000, CHV applied to the City's Mobilehome Park Rental Review Board (Rent Board) for rent adjustments sufficient to return the park to a fair rate of return, measured by the pre-rent-control return adjusted for inflation. App. A-5. In response, the Rent Board adopted a final determination approving adjustments totaling approximately six percent of those CHV had requested. *Id.* Consequently, CHV filed the present action in federal district court under 42 U.S.C. § 1983, alleging, *inter alia*, that the Rent Board had denied CHV a fair return on its investment, depriving CHV of its reasonable, investment-backed expectations and thereby infringing the Takings Clause of the Fifth Amendment. *Id.*

Because the district court was under the mistaken belief that CHV could have sought just compensation by filing an

inverse condemnation claim in state court, CHV's federal takings claim was dismissed as unripe under *Williamson County*. App. B-11-B-13.

On appeal, the Ninth Circuit affirmed the dismissal of CHV's takings claim on ripeness grounds. The appellate panel correctly recognized that inverse condemnation is no longer available to takings claimants in CHV's position. App. A-8. Instead, in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997), the California Supreme Court limited plaintiffs who allege a taking by operation of confiscatory rent regulations to a *due process* remedy of a writ of mandate, followed by a return to the Rent Board to request another rent adjustment. App. A-8-A-9. Although the Ninth Circuit correctly characterized the question of whether just compensation could ever actually be obtained via these procedures as "highly speculative," App. A-13, the appellate panel nevertheless held that scheme affords a *reasonable*, *certain*, and *adequate* means of securing just compensation, as required by *Williamson County*, 473 U.S. at 194.

CHV now petitions this Court to resolve a conflict among the circuit courts of appeals on whether *Williamson County* bars federal takings claimants from access to federal courts when the state courts have previously held that compensation is not available in such cases. Certiorari is also required to determine whether the Ninth Circuit correctly interpreted *Williamson County* as relegating federal takings claimants to state court even when the state's highest court has held that no inverse condemnation claim may be stated for Petitioner's taking. Finally, CHV petitions this Court to revisit an important constitutional question left open in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997): whether the Fifth Amendment's mandate of just compensation is satisfied by procedures that *cannot* result in the payment of compensation by the government, but conceivably might generate revenues

from private third parties to partially offset the financial impact of the taking.

REASONS WHY THE PETITION SHOULD BE GRANTED

I

THIS COURT'S *WILLIAMSON COUNTY* DECISION SHOULD NOT BE INTERPRETED TO BAR FEDERAL TAKINGS CLAIMANTS FROM ACCESS TO FEDERAL COURTS WHEN, AS IN THIS CASE, THE STATE COURTS DO NOT PROVIDE AN INVERSE CONDEMNATION REMEDY

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, this Court set out two requirements to "ripen" a regulatory takings claim for adjudication in federal court. First, the plaintiff must have received "a final decision regarding the application of the regulations to the property at issue," *id.* at 186; and second, the plaintiff must have sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. But the latter, "state procedures" prong of *Williamson County* applies only when the state makes available "*reasonable*, *certain*, and *adequate*" procedures for obtaining just compensation for a taking. *Id.* (emphasis added). In *Williamson County* itself, the Court's finding that the plaintiff's takings claim was unripe rested upon the immediate availability of inverse condemnation proceedings in the Tennessee courts "under certain circumstances"—specifically including the circumstances presented by the facts of that case. *Id.* at 196-97.

In the case at bar, it is undisputed that CHV has obtained a final determination within the meaning of *Williamson County*. App. A-7. Under California law, however, CHV is barred from filing an inverse condemnation claim for just compensation. Instead, rental property owners like CHV, with a fully ripe takings claim under the first prong of *Williamson County*, are

limited to a *due process* remedy of administrative mandamus, followed (if mandamus is granted) by a return to the offending state agency to seek a *second* final determination of the same administrative application the agency has already considered and denied. Rejecting CHV's argument that resort to such measures cannot be required under *Williamson County*, the Ninth Circuit held that CHV is required to seek compensation under the procedures established by the California Supreme Court in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997). App. A-12-A-14.

In *Kavanau*, the California Supreme Court foreclosed payment of just compensation by the government as a remedy for a plaintiff in CHV's position, who alleges a regulatory taking effected by the deprivation of a fair return on rental property by the final determination of a local rent board. As acknowledged by the court below, the only remedy available under *Kavanau* is to "challenge the board's actions by applying for a writ of administrative mandate in state court," followed (if the writ is granted) by a return to the Rent Board and the re-filing of the same petition for a rent adjustment that was already denied.[1] App. A-9. Contrary to the appellate panel's interpretation, however, the *Kavanau* procedures were never intended as, nor do they provide, a means for securing just compensation for a taking.

To understand the present status of Fifth Amendment takings claims in the California courts, it is helpful to review the state's historical approach to regulatory takings law. In *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), the California Supreme Court expressly formulated a doctrine that the state's property owners had already learned: no

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[1] Since CHV's original petition sought only to return the park to a fair rate of return—the minimum standard necessary to avoid a taking—any hypothetical second petition would necessarily seek an identical adjustment.

compensation remedy existed in that state for regulatory takings. *Id.* at 30-31. Owners whose property was confiscated by excessive regulation were limited to a *due process remedy* of invalidation of the offending statute or regulation. *Id.*

This Court directly confronted and overruled *Agins* in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Squarely rejecting the California Supreme Court's rule that takings claimants could be limited to a due process remedy, this Court stated:

> [G]overnment action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.

First English, 482 U.S. at 315. Accordingly, the California Supreme Court doctrine espoused in *Agins* was overruled as "inconsistent[] with the requirements of the Fifth Amendment." *Id.* at 311.

However, as this Court had previously learned with *Brown v. Board of Education*, 347 U.S. 483 (1954), it is one thing to instruct the state courts on the requirements of the Constitution, but it can be quite another matter to obtain compliance with those instructions. In response to *First English*, the California Supreme Court created a stringent new procedural rule which had the effect of dramatically limiting claims for regulatory takings. Under *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994), regulatory takings claims must still proceed by way of administrative mandamus or declaratory relief. *Id.* at 1056-60. Only if a takings claimant first has the offending regulation *invalidated* via these procedures may he then seek compensation.

Obviously, mandamus is not an appropriate remedy for a taking. Indeed, such a proceeding has been expressly

recognized as inadequate for this purpose. *See First English,* 482 U.S. at 317 (disapproving as inadequate the California Supreme Court's doctrine of allowing only mandamus or declaratory relief as remedies for a taking); *Williamson County*, 473 U.S. at 197. A petition for administrative mandate seeks to invalidate the application of a regulation or ordinance as an abuse of discretion (Cal. Code of Civ. Proc. § 1094.5(b))—a result that is "universally recognized as a due process remedy." J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 261 n.285 (2003). Invalidation of the government's action is simply irrelevant to a Fifth Amendment takings claim, in which the plaintiff may readily acknowledge that the taking was accomplished through an otherwise legitimate exercise of state authority. *See* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepp. L. Rev. 99, 125 (1994):

> [It is unclear] why injured property owners should be forced to seek an invalidation remedy . . . when the legitimacy of the regulation may be conceded by the owner from the outset . . . . Until now, it had not been suggested that a writ of administrative mandamus is required to remedy permissible governmental actions.

See also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992) (Lucas "did not take issue with the validity of the Act").

Thus, the initial response of the California Supreme Court to *First English* was to establish that regulatory takings plaintiffs must effectively pursue a due process remedy before compensation under the Fifth Amendment will even be

considered. Only three years later, in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, the state's high court went further and established that—at least where a taking is alleged through the confiscatory effects of rent regulations—the due process remedy mandated by *Hensler* altogether forecloses an inverse condemnation remedy.

In *Kavanau*, the plaintiff complied to the letter with *Hensler*'s rigorous procedural demands. His administrative mandamus petition was filed within the fleeting 90-day statute of limitations and, remarkably, Kavanau obtained a judgment from the state appellate court finding that the rent board's application of its regulations were unconstitutionally confiscatory. *Id.* at 855. Still complying with the procedures specified in *Hensler*, Kavanau then filed a timely inverse condemnation action seeking compensation for the period during which the rent board had wrongfully deprived him of a fair return. *Id.*

At this point the California Supreme Court, faced with the prospect of actually subjecting an entity of California government to the requirements of the Takings Clause, created a new doctrine by which it could avoid doing so. Having already established (in *Hensler*) that obtaining a due process remedy was a *prerequisite* to seeking just compensation for a taking, the *Kavanau* court went on to rule that the due process remedy was also, at least in this class of cases, a *substitute* for compensation. According to the court's reasoning, because Kavanau could return to the rent board and go through the petitioning process anew (to once more seek the rent increases that had previously been denied), this in itself was an adequate remedy for the taking:

> [A] remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*.

Kavanau, 941 P.2d at 865 (emphasis added).

Because every takings claimant is required, under California's procedural scheme, to obtain a due process remedy as a prerequisite to pursuing inverse condemnation, and a due process remedy obviates the finding of a taking (and therefore moots any inverse condemnation claim), the California Supreme Court has effectively foreclosed inverse condemnation as a remedy in all cases such as the one at bar. Notwithstanding this Court's pronouncement in *First English* overruling the 1979 *Agins* doctrine, the California Supreme Court has in fact *retained* the *Agins* rule: inverse condemnation is not recognized as a remedy for the sort of taking alleged in this case, as a matter of law.

Even if CHV, like Earl Kavanau, should prevail at a constitutionally inadequate mandamus hearing,[2] the *most* it could obtain would be an order compelling the Commission to set aside its final determination and open a new hearing on CHV's rent-increase petition. Cal. Code of Civ. Proc. § 1094.5(b). Just compensation from the City for its already completed violation of the Fifth Amendment would still not be available under *Kavanau*. This highlights the Ninth Circuit's erroneous belief that "inverse condemnation and section 1983

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[2] Mandamus hearings normally review only the record compiled by the defendant agency—whose proceedings do not include such fundamental safeguards as formal evidentiary rules, the right to cross-examine witnesses, or the ability to compel attendance or testimony. Worse, this constitutionally inadequate record is reviewed under a deferential, "substantial evidence" standard, the results of which will be res judicata for purposes of any subsequent litigation. *See* Sharon L. Browne, 22 Pepp. L. Rev. at 125; *Mola Development Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405, 410-411, 67 Cal. Rptr. 2d 103, 107 (Cal. 4th Dist. Ct. App. 1997) (failure to pursue mandamus hearing is res judicata, and inverse condemnation deemed waived, even though the administrative decision was reached without affording plaintiff the right to subpoena or cross-examine witnesses, and owner asserted violation of federal rights under Section 1983).

damages remedies *appear* to remain available if the mandamus/*Kavanau* adjustment remedy proves inadequate." App. A-12. Far from holding out any reasonable expectation of a subsequent inverse condemnation claim, the *Kavanau* court pointedly evaded this issue, declaring that it would not "decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable." 941 P.2d at 867. The California court did not even mention inverse condemnation as being among the hypothetical remedies which it "*might*" deem appropriate in a second takings action. The hypothetical availability of a remedy so speculative that it has never been described with specificity, much less awarded, cannot constitute a "reasonable, *certain*, and adequate" method for obtaining just compensation, as required by the Supreme Court in *Williamson County*.

This is why the California Supreme Court itself has never characterized the *Kavanau* procedures as a compensation remedy for a regulatory taking within the meaning of *Williamson County*. Instead, the *Kavanau* court expressly fashioned a due process remedy, which that court found would "obviate" a finding of takings liability for plaintiffs in the position of CHV. *See Kavanau*, 941 P.2d at 865. The state's high court was quite clear in ruling that an aggrieved property owner in CHV's position "***is not entitled to maintain an inverse condemnation action***." *Id.* at 854 (emphasis added). Again, a rental property owner who has been deprived of a fair return "***has not stated a viable inverse condemnation claim***." *Id.* at 867 (emphasis added). As Justice Baxter stated in dissent, the *Kavanau* majority held "***that a compensable taking cannot occur***" under the facts of that case or the case at bar. *Id.* at 872 (Baxter, J., dissenting) (emphasis added). *Accord Galland v. City of Clovis*, 16 P.3d 130, 134 (Cal. 2001) (*Kavanau* "***precluded a claim for inverse condemnation***") (emphasis added).

By limiting the remedy available to plaintiffs who assert civil rights violations under 42 U.S.C. § 1983 to a return to the very state officials charged with violating their rights, the California courts have placed themselves at odds with the fundamental purpose and function of Section 1983. As Justice Brown stated in dissent in *Galland v. City of Clovis*, 16 P.3d at 161 (Brown, J., dissenting):

> The thrust of [the Supreme Court's section 1983] decisions is that, far from relegating plaintiffs to the same corrupt system that inflicted their injury, section 1983 exists to give plaintiffs an adjudicative alternative that will ensure protection of their rights. Therefore, as the high court stated in [*Felder v. Casey*, 487 U.S. 131, 147 (1988)], "there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights . . . could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."

By holding such a procedure to be an adequate means of securing compensation under *Williamson County*, the Ninth Circuit has effectively deprived California takings claimants of a forum to assert their Fifth Amendment rights. Intervention by this Court is the last hope for California property owners, who seek nothing more than an adequate forum in which to pursue their right to just compensation, as guaranteed by the Takings Clause of the Fifth Amendment.

II

THIS COURT MUST RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO WHETHER *WILLIAMSON COUNTY* REQUIRES A FEDERAL TAKINGS CLAIMANT TO SUBMIT TO ADJUDICATION BY STATE COURTS THAT HAVE HELD THAT COMPENSATION IS NOT AVAILABLE UNDER THE FACTS OF THE CASE

Notwithstanding *Williamson County*, a regulatory takings claim is ripe for federal adjudication if the state courts have consistently denied compensation for claims of the same type. Such a situation is uniformly regarded as confirmation that the state's procedures for securing just compensation are *inadequate*, within the meaning of *Williamson County*.

> The difficult question is when the inadequacy exception should apply. Several courts have indicated that it is relevant where there is a high degree of certainty that state courts will refuse to award just compensation *and that it definitely applies where the takings claim is on all fours with previous state decisions that deny compensation.* A logical generalization from these decisions is that the exception should at least apply where the claimant shows, through an analysis of state law and judicial outcomes, that a resort to state procedures is highly likely to be futile; i.e., where courts construct takings law to virtually foreclose vindication of a particular takings claim and where it is empirically clear that the state process rarely, if ever, results in an award of damages.

J. David Breemer, 18 J. Land Use & Envtl. L. at 258-59 (emphasis added; footnotes deleted). *See also* Thomas E. Roberts, *Fifth Amendment Takings Claims in Federal Court:*

The State Compensation Requirement and Principles of Res Judicata, 24 Urb. Law. 479, 497 (1992) (if state courts have already denied compensation for same type of claim, the case is ripe for federal adjudication).

This interpretation of *Williamson County* is settled law in the courts of the Fourth Circuit. *See Naegele Outdoor Advertising, Inc. v. City of Durham*, 803 F. Supp. 1068, 1072-73 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994) (holding a Fifth Amendment takings challenge was ripe for federal adjudication because the state courts had already rejected compensation in identical circumstances). The Fifth Circuit applies the same rule. In *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991), that court of appeals found *Williamson County* to carry an implication that "the mere existence of some compensation mechanism does not necessarily render those procedures adequate." *Id.* at 934. The *Samaad* court went on to survey cases establishing that "'inadequate' procedures are those that *almost certainly* will not justly compensate the claimant." *See also Rolf v. City of San Antonio*, 77 F.3d 823, 826 (5th Cir. 1996) (state procedures under *Williamson County* "are inadequate when they '*almost certainly* will not justly compensate the claimant'") (quoting *Samaad*, 940 F.2d at 934). The Seventh Circuit came to the same conclusion in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) (a takings claim is ripe for federal adjudication when "it is apparent that the state does not intend to pay compensation"); as did the Eleventh Circuit in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516-17 (11th Cir. 1987) (holding a takings claim arising from application of zoning was ripe for federal adjudication because the Florida Supreme Court did not recognize a compensation claim for confiscatory zoning).

In California, no published decision of the state courts has ever awarded or upheld an award of just compensation for a

taking that did not entail a physical invasion or occupation of property. More specifically, the state courts have repeatedly and uniformly denied compensation in cases arising from the same legal and factual milieu as the case at bar, involving takings challenges triggered by the confiscatory impact of mobile home rent control ordinances. *See, e.g., Yee v. Mobilehome Park Rental Review Board*, 62 Cal. App. 4th 1409, 73 Cal. Rptr. 2d 227, 235-37 (Cal. 4th Dist. Ct. App.1998) (describing park owner's Fifth Amendment takings suit as "an often rejected claim," and denying compensation on ground that availability of a due process remedy "is a valuable benefit that satisfies the takings clause"); *Montclair Parkowners Association v. City of Montclair*, 76 Cal. App. 4th 784, 90 Cal. Rptr. 2d 598, 603-05 (Cal. 4th Dist. Ct. App. 1999) (denying takings claim and expressly rejecting *federal* precedent that would have mandated award of compensation). Given California's unequivocal record of rejecting compensation claims on all fours with the one at bar, CHV's claim would have been deemed ripe for adjudication in federal court under the precedent of the Fourth, Fifth, Seventh, or Eleventh Circuit. By denying Petitioner's access to federal court despite California's clear rejection of substantially identical takings claims, the Ninth Circuit has created a conflict that can only be resolved by this Court.

The Ninth Circuit has left CHV no alternative but to litigate before a state judiciary that has already ruled that compensation is not available for claims of this type, and does not even offer an inverse condemnation remedy—in the guise of "ripening" its federal Fifth Amendment takings claim. This absurd result cannot be what this Court intended in *Williamson County*. Nevertheless, unless certiorari is granted for purposes of ordering the Ninth Circuit to exercise its rightful jurisdiction, property owners like CHV will continue to suffer deprivations of rights supposedly guaranteed under the United States Constitution, yet be denied the opportunity to defend those

rights in federal court. Worse, the availability of a federal forum to address violations of the Fifth Amendment will depend entirely on the circuit in which the alleged violation occurs.

III

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION LEFT UNANSWERED IN *SUITUM V. TAHOE REGIONAL PLANNING AGENCY*—WHETHER THE FIFTH AMENDMENT'S MANDATE OF JUST COMPENSATION CAN BE SATISFIED BY PROCEDURES THAT HOLD OUT THE PROSPECT OF RECOVERY *NOT* FROM THE GOVERNMENT, BUT FROM THIRD PARTIES WHO BEAR NO RESPONSIBILITY FOR THE TAKING

In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, this Court vacated a Ninth Circuit decision that implicated important issues raised by the case at bar. In *Suitum*, the defendant agency had allegedly deprived the plaintiff of all economically viable use of her land, but the Ninth Circuit found the takings claim was not ripe under *Williamson County*. *Id.* at 733. The court of appeals held that Suitum's claim could not be litigated until she attempted to utilize the agency's "transfer of development rights" program—a scheme that held out the (untested) possibility that Suitum could receive payments from third-party property owners in the region, thereby offsetting the financial impact of the regulations. *Id.*

Because the Ninth Circuit had found Suitum's claim unripe under *Williamson County's first* prong, this Court expressly declined to decide whether such third-party offsets could qualify as an adequate means of providing just compensation within the meaning of *Williamson County's second* prong. *Id.* at 728. However, Justice Scalia's concurrence, joined by Justices O'Connor and Thomas, drew attention to "[t]he cleverness of the scheme" the agency had

devised, which "causes the payment to come, not from the government, *but from third parties*." *Id.* at 748 (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original).

In the present case, as in *Suitum*, the Ninth Circuit has found a takings claim unripe because CHV has not pursued similarly untested procedures which could never result in the payment of compensation by the government, but nevertheless *might* generate offsetting revenues from third parties via higher future rents. Although CHV is barred from pursuing compensation via inverse condemnation, the California courts hold out the tenuous prospect that *if* CHV can prevail at a constitutionally inadequate mandamus hearing and have the Rent Board's determination invalidated, and *if* CHV can then succeed in prevailing upon the same Rent Board to grant adjustments to offset the damages created by its prior unconstitutional actions, *then* CHV can attempt to impose those adjustments on future tenants—who may be a completely different population from those who benefitted from the Rent Board's past infractions, and who may or may not be willing and able to pay amounts sufficient to offset CHV's losses. The troubling aspects of regarding such a remedy as satisfying the Fifth Amendment's mandate of just compensation were highlighted by Judge O'Scannlain in his special concurrence below.

The Fifth Amendment requires that private property not be taken for public use "without payment of just compensation." Since the sole function of the Constitution is to constrain government action, it would have been redundant to insert the words "by the government" at the end of the clause. That the government may not evade the compensation requirement by dragooning innocent third parties and forcing them to pay its debts should be implicit in our understanding of the Constitution and its function. Yet as Judge O'Scannlain noted below, under California's *Kavanau* procedures, even if a

property owner should succeed in obtaining the remedy the state holds out, "the burden of compensation falls not on the government as the representative of the benefitting general public, but on a select group of future tenants." App. A-14. Judge O'Scannlain continues:

> [T]he clear import . . . of the language of the Fifth Amendment itself, is that those whose property has been taken for public use must be compensated by the general public through the government. The Fifth Amendment is therefore violated when government attempts to lay the general public's burden of just compensation on third parties.

Id. A-15. Not only has the Supreme Court "invariably operated under the assumption that the *government* is the entity charged with paying just compensation," *id.*, this assumption also permeates lower court opinions and the legal literature on Fifth Amendment takings. *See, e.g.*, *United States v. Dickinson*, 152 F.2d 865, 868 (4th Cir. 1946) ("compensation must be paid ***by the government*** under the rules established by the decisions") (citing to six decisions of the Supreme Court; emphasis added); Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U. L. Rev. 413, 420 n.42 (2002) ("plain meaning of the Takings Clause . . . provides that just compensation must be paid ***by the government*** to the affected property owner") (emphasis added)).

Judge O'Scannlain's conclusion, that a plaintiff must actually utilize California's *Kavanau* procedures before complaining that they are constitutionally inadequate, sets uneasily with his recognition that these procedures could *never* result in an award of just compensation from the City. App. A-16. Whether such procedures can be deemed adequate within the meaning of *Williamson County* requires resolution of the question this Court left unresolved in *Suitum*: whether the Fifth Amendment requires just compensation to be paid by the

government agency responsible for the taking, or whether that liability can be passed on to private third parties who bear no responsibility for the government's confiscatory actions.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: July, 2004.

Respectfully submitted,

DAVID SPANGENBERG
Of Counsel
Law Office of David Spangenberg
420 Hudson Street, Suite A
Healdsburg, California 95448
Telephone: (707) 473-4340
Facsimile: (707) 473-0656

R.S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Petitioner

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Appendix A	Opinion of the Ninth Circuit Court of Appeals, filed January 2, 2004.
Appendix B	Order of the United States District Court for the Central District of California, filed June 11, 2002.
Appendix C	Order of the Ninth Circuit Court of Appeals, filed March 22, 2004.
Appendix D	City of Carson's Mobilehome Space Rent Control Ordinance.

Appendix A-1

No. 02-56213

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

CARSON HARBOR VILLAGE, LTD., a Limited Partnership dba Carson HarborVillage Mobile Home Park,	)	Argued and Submitted June 3, 2003
Plaintiff-Appellant,	)	Filed
v.	)	Jan. 2, 2004
CITY OF CARSON, a Municipal Corporation; Carson City Mobilehome Park Rental Review, Board,	)	
Defendants-Appellees,	)	
and	)	
Carson Harbor Village Mobilehome Park Homeowners Association, Real Party in Interest,	)	
Defendant.	)	

* * * *

Background: Owner of mobile home park brought suit under § 1983 against city and city rental review board alleging that mobile home rent control laws violated of the Takings Clause of the Fifth Amendment. The United States District Court for the Central District of California, Robert J. Kelleher, J., dismissed the claims as unripe and owner appealed.

Holding: The Court of Appeals, Fisher, Circuit Judge, held that claim was not ripe for adjudication in federal court.

Affirmed.

O'Scannlain, Circuit Judge, concurred specially and filed opinion.

David Spangenberg, Healdsburg, California, for the plaintiff-appellant.

Rochelle Browne, Peter M. Thorson, Richards Watson & Gershon, Los Angeles, California, for the defendants-appellees City of Carson and City of Carson Mobilehome Park Rental Review Board.

Appeal from the United States District Court for the Central District of California, Robert J. Kelleher, District Judge, Presiding. D.C. No. CV-01- 04799-RJK.

Before: REINHARDT, O'SCANNLAIN and FISHER, Circuit Judges.

FISHER, Circuit Judge.

"We are called upon to consider, yet again, a takings challenge to mobile home rent control laws." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 683 (9th Cir.1993). Carson Harbor Village, Ltd. ("Carson Harbor") is a large mobile home park located in the City of Carson ("City"). This case arises out of the City's handling of Carson Harbor's June 2000 and April 2001 applications for rent increases. In June 2000, Carson Harbor applied for monthly rent increases ranging from approximately $223 to $241 per mobile home space, but the City's Mobilehome Park Rental Review Board ("Board")

approved an increase of only $14.29 per space.[1] Thereafter, Carson Harbor sued in federal district court under 42 U.S.C. § 1983 claiming a violation of the Fifth Amendment's Takings Clause. The district court dismissed Carson Harbor's regulatory takings claims as unripe under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Carson Harbor now appeals.[2]

We agree that this regulatory takings claim is unripe. Carson Harbor has failed to avail itself of state procedures for seeking just compensation, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), and has failed to show that these procedures are inadequate.

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[1] In April 2001, Carson Harbor filed an application for $295,657 in regulatory lag rents, attorney's fees and costs incurred in obtaining the $14.29 rent increase, but the City allegedly refused to process the application.

[2] As a preliminary matter, we will not consider Carson Harbor's second regulatory takings claim, challenging the City's alleged refusal to process the April 2001 regulatory lag rent application. Carson Harbor does not address the dismissal of this claim in its appellate brief and has therefore waived this issue on appeal. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 511 (9th Cir.2002); *Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir.1996). Therefore, the only claim we address in this opinion is Carson Harbor's regulatory takings claim challenging the Board's partial denial of Carson Harbor's June 2000 rent increase application.

In addition to the regulatory takings claims, Carson Harbor also brought substantive due process, procedural due process and equal protection claims challenging the City's handling of the June 2000 and April 2001 rent increase applications. We address these claims in a separate memorandum disposition filed contemporaneously with this opinion.

Accordingly, we affirm the district court's dismissal of Carson Harbor's regulatory takings claim.

FACTUAL AND PROCEDURAL BACKGROUND[3]

Carson Harbor is a 420 space, 70 acre mobile home park located in the City of Carson, California and accounts for approximately 17 percent of the City's mobile home rental housing. In 1979, the City enacted the Mobilehome Space Rent Control Ordinance ("Ordinance"), which places a ceiling on rent levels for mobile home spaces. *See* Carson Municipal Code ("CMC"), Art. IV, Ch. 7, §§ 4700 *et seq*. The purpose of the Ordinance was to prevent mobile home park owners from exploiting a perceived shortage in mobile home spaces by charging high rents. When the Ordinance was enacted, Carson Harbor was newly opened and was offering below-market rents in an effort to attract tenants. The Ordinance froze those below-market rents in place and required Carson Harbor to secure the Board's approval before instituting any rent increases.

The Ordinance does not provide for automatic rent increases for inflation or changed circumstances such as increased costs of operation or capital investments. Instead, a mobile home park owner seeking a rent adjustment above the ceiling must submit a rent increase application to the Board. CMC §§ 4703, 4704. The Board must then hold a public hearing, at which the mobile home park owner, affected residents and other interested persons may offer testimony. *Id.*

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[3] This factual background is based on the complaint. Because this case was dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the facts alleged in the complaint must be accepted as true. *Winn v. Killian*, 307 F.3d 1011, 1014 n. 1 (9th Cir.2002).

§ 4704(e)(f). After a hearing on a proposed rent increase, the Board "may approve the rent increase requested, approve a modified rent increase or deny the application pursuant to the standards established by subsection[ ](g)[ ] of this Section." *Id.* § 4704(f)(3). Subsection (g) in turn provides that the Board "shall grant such rent increases as it determines to be fair, just and reasonable. A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner." *Id.* § 4704(g). The Board must consider 11 enumerated but nonexclusive factors when making its determination. *Id.* These include changes in the Consumer Price Index, capital improvements to mobile home spaces and changes in reasonable operating and maintenance expenses. *Id.*

This case arises out of the City's handling of Carson Harbor's June 2000 application for a rent increase. On June 28, 2000, Carson Harbor applied for monthly rent increases ranging from $222.65 to $240.73 for 407 of its 420 mobile home spaces. Carson Harbor claims that it sought the increases "so that the fair rate of return in 1999 would equal the fair rate of return at the inception of rent control in constant dollars." The Board held a hearing on the proposed increases on February 29, 2001, and subsequently approved a monthly rent increase of only $14.29 per space. Carson Harbor alleges that the Board "arbitrarily excluded hundreds of thousands of dollars in legitimately incurred operating expenses" in determining the size of the rent increase and that the Ordinance, "as applied, totally destroyed Plaintiff's reasonable investment-backed expectations."

On May 29, 2001, Carson Harbor filed a complaint in federal district court under 42 U.S.C. § 1983 alleging that the Board's partial denial of its June 2000 rent increase application constituted a regulatory taking of property in violation of the Fifth Amendment's Taking Clause, made applicable to the

states through the Fourteenth Amendment. The defendants subsequently moved to dismiss Carson Harbor's regulatory takings claim for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The district court granted the motion, holding that Carson Harbor's regulatory takings claim was unripe because Carson Harbor had failed to pursue state remedies for just compensation as required by *Williamson*.

STANDARD OF REVIEW

We review de novo a district court's dismissal of a complaint for lack of subject matter jurisdiction under *Rule 12(b)(1). Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir.2000). In reviewing the Rule 12(b)(1) dismissal, we must accept all factual allegations in the complaint as true. *Id*.

DISCUSSION

Under *Williamson*, an as-applied takings claim is ripe only if the plaintiff can establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the claimant has sought "compensation through the procedures the State has provided for doing so." 473 U.S. at 186, 194, 105 S.Ct. 3108; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). The first ripeness requirement embodies "the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). As a general rule, until the landowner has "followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering [whether

to grant the landowner's request], including the opportunity to grant any variances or waivers allowed by law[,] . . . the extent of the restriction on property is not known and a regulatory taking has not yet been established." *Id.* at 620-21, 121 S.Ct. 2448. "The second [ripeness requirement] stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment; 'if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.'" *Suitum*, 520 U.S. at 734, 117 S.Ct. 1659 (quoting Williamson, 473 U.S. at 195, 105 S.Ct. 3108).

We think it beyond question—and the City does not dispute—that Carson Harbor's regulatory takings claim satisfies the first (finality) prong of the *Williamson* ripeness test. Carson Harbor made a meaningful application for a variance from the rent control law by submitting an application for a rent increase in June 2000, which the Board partially granted and partially denied on February 28, 2001. *See Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 475(9th Cir.1994) (holding than an earlier regulatory takings claim satisfied the first prong of *Williamson* because Carson Harbor had applied for a rent increase, which was partially granted and partially denied), *overruled in part on other grounds by WMX Techs. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.1997) (en banc); *see also Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.1994).

The disputed question on appeal is whether Carson Harbor has satisfied the second (exhaustion) prong of *Williamson.* Carson Harbor admits that it has failed to seek state remedies for the alleged taking, but argues that it is not required to do so because those remedies are inadequate. *Williamson* itself held that a plaintiff may be excused from exhausting state remedies if the plaintiff demonstrates that the remedies are "unavailable

or inadequate." 473 U.S. at 197, 105 S.Ct. 3108; *see also Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir.2001) (en banc), *aff'd by Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003). "A landowner who seeks to sue in federal court before seeking compensation from the state 'bears the burden of establishing that state remedies are inadequate.'" *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506-07 (9th Cir.1990) (quoting *Austin v. City & County of Honolulu*, 840 F.2d 678, 680 (9th Cir.1988)). "A landowner fails to discharge this burden by showing that state procedures are untested or uncertain." *Id.* at 1507; *see also Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir.1988); *Austin*, 840 F.2d at 681.

The question, then, is whether Carson Harbor has shown that California's procedures for seeking just compensation are inadequate. Until the California Supreme Court decided *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), the state procedure for obtaining just compensation for a takings claim was to bring an inverse condemnation action in state court. If that had remained the procedure when the taking allegedly occurred in this case, there would be no question that California's compensation remedies were adequate and that Carson Harbor's takings claim would be unripe. We have "expressly held that, post 1987, California's inverse condemnation procedures are adequate to address a regulatory takings claim." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir.1998) (citing *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 164 (9th Cir.1993); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir.1991)).

Kavanau and, subsequently, *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711, 16 P.3d 130 (2001), however, have modified California's procedure for seeking just

compensation in a takings case. In *Kavanau*, the court held that "a landlord may not obtain inverse condemnation damages against a government agency for temporarily imposing rent ceilings . . . so as long as the landlord was able to obtain an adequate adjustment of prospective rents that would compensate for past losses." *Galland*, 103 Cal.Rptr.2d 711, 16 P.3d at 143 (interpreting *Kavanau*); *see Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 854 ("[W]e conclude Kavanau is not entitled to maintain an inverse condemnation action, because he may obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process."). Before an owner of rental property can bring a state inverse condemnation proceeding against a rental review board, the owner must first challenge the board's actions by applying for a writ of administrative mandate in state court. *See Galland*, 103 Cal.Rptr.2d 711, 16 P.3d at 143. Once the writ has been granted, the property owner must then seek an adjustment of future rents from the rental review board. Such an adjustment is also referred to as a "*Kavanau* adjustment." *See id.* at 145.

In *Galland*, the court considered the further question whether a property owner could seek section 1983 damages in state court for a violation of substantive due process *before* seeking a writ of mandate and a *Kavanau* adjustment. The court answered this question in the negative: "[W]hen landlords seek section 1983 damages from allegedly confiscatory rent regulation, we hold that they must show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate." *Id.* at 145. Under *Kavanau* and *Galland*, then, it appears that a landowner must seek a writ of mandate and *Kavanau* adjustment before bringing an inverse condemnation or section 1983 action in state court. *Kavanau*

and *Galland* thus mark a significant change in California's state law remedies for excessive rent control.[4]

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[4] The district court and the defendants try to distinguish *Kavanau* on the ground that the *Kavanau* court did not reach the question whether a taking had occurred. That distinction misses the point. The *Kavanau* court concluded that there was no need to decide whether the rent regulation constituted a taking, because even if it did, the mandamus/*Kavanau* adjustment process provided an adequate remedy. *Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 865. The district court and the defendants also try to distinguish *Galland* on the ground that it dealt with a substantive due process challenge, not a takings challenge. This, too, is an irrelevant distinction because the *Galland* court expressly recognized takings and substantive due process claims as interchangeable:

> To be sure, *Kavanau* involved a takings claim, and this case is concerned with what is labeled substantive due process. But we have recognized that a price regulation that causes confiscation may be designated interchangeably as either a taking of property under the Fifth and Fourteenth Amendments of the United States Constitution or a violation of due process. It would be incongruous for us to conclude, on the one hand, as we did in *Kavanau*, that a landlord permitted adequate rent adjustments had not suffered a constitutional injury under the takings clause, but, on the other hand, that he or she has suffered such an injury under the due process clause.

Galland, 103 Cal.Rptr.2d 711, 16 P.3d at 144 (citations omitted). We do not here consider the accuracy of the court's characterization of federal law. As a matter of state law, however, the court's treatment of takings and substantive due process claims as interchangeable indicates that regardless of which claim the property owner asserts, the landlord must first pursue the mandamus/*Kavanau* process before bringing an

(continued...)

Carson Harbor argues that *Kavanau* and *Galland* have rendered California's compensation scheme inadequate. In *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, No. 02-15986, 2003 WL 22961340 (9th Cir. Dec.17, 2003), we recently concluded that the mobile home park owner failed to show that California's state remedies are inadequate. *Id.* at 659, 2003 WL 22961340 at *6. Carson Harbor contends, however, that *Kavanau* and *Galland* have effectively deprived rent-controlled property owners of the ability to bring inverse condemnation or section 1983 damages actions, which places them in the very position the Supreme Court declared unconstitutional in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Before *First English* was decided, a landowner could not maintain an inverse condemnation proceeding in California state court based on a regulatory taking. *See Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, 29- 31 (1979), *aff'd on other grounds*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Under *Agins*, the landowner's sole remedy was to bring an action for a writ of mandate. Even if the writ were granted, the landowner could not receive compensation for damages incurred before issuance of the writ; rather, the landowner could only receive compensation for damages incurred after the writ was issued, if the government persisted in enforcing the invalidated regulation. In *First English*, the United States Supreme Court abrogated the *Agins* rule, holding that California's writ of mandate was an inadequate remedy for a regulatory taking of property. 482 U.S. at 321, 107 S.Ct. 2378. Carson Harbor argues that *Kavanau* and *Galland* have in effect restored the *Agins* rule, and that *First English* therefore requires us to declare California's compensation scheme inadequate.

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[4] (...continued)
inverse condemnation action or section 1983 action for damages in state court.

We do not read *Kavanau* and *Galland* as reinstating the *Agins* rule. First, the mandamus/*Kavanau* adjustment remedy does—at least in principle—allow a landowner to recover for damages incurred prior to issuance of the writ of mandate: the *Kavanau* adjustment is supposed to compensate for past losses. Second, inverse condemnation and section 1983 damages remedies appear to remain available if the mandamus/*Kavanau* adjustment remedy proves inadequate. In *Kavanau*, the court stated that it did not need to:

> decide what alternative remedy might be appropriate if a landlord can establish that the remedy of future rent adjustments is for some reason unavailable. But before *Kavanau* can allege the unavailability of future rent adjustments, he must petition for those adjustments, the Rent Board must determine, subject to judicial review, their appropriate amount, and he must attempt to impose them.

66 Cal.Rptr.2d 672, 941 P.2d at 867.

In *Galland*, the court went further and held that a landlord can seek section 1983 damages if he can "show (1) that a confiscatory rent ceiling or other rent regulation was imposed and (2) that relief via a writ of mandate and a *Kavanau* adjustment is inadequate." 103 Cal.Rptr.2d 711, 16 P.3d at 145.

Carson Harbor further contends that a writ of mandate and *Kavanau* adjustment will not provide adequate compensation because the superior court issuing the writ must remand the case to the municipal rental review board to determine the increase in future rents necessary to compensate the plaintiff for past losses. *See Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 866. According to Carson Harbor, the rental review board is unlikely to grant an adequate rent increase because it was unwilling to

grant an adequate rent increase in the first place, and consequently California's new compensation scheme will "result in a string of writ of mandate challenges, and a string of remand hearings, the costs of litigation ever increasing, until one party or another, the city or the park owner, gives up in exhaustion."

We acknowledge that Carson Harbor raises serious concerns about the adequacy of the new compensation procedures established in *Kavanau* and *Galland*. Nevertheless, the alleged inadequacy of the procedures remains highly speculative. Carson Harbor has not sought a writ of mandate and *Kavanau* adjustment, nor has Carson Harbor identified any landowner who has sought and failed to receive adequate compensation through these procedures. At best, Carson Harbor has merely alleged that the new compensation procedures are "untested or uncertain." *Del Monte Dunes*, 920 F.2d at 1507. Under our precedents, that is not enough to qualify for an exemption from *Williamson*'s second ripeness requirement. *Id.* It may turn out that the mandamus/ *Kavanau* process proves to be futile. We will not, however, assume the accuracy of this prediction. *See Hacienda Valley*, 353 F.3d at 659, 2003 WL 22961340, at *6.[5] Accordingly, we affirm the

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[5] Carson Harbor also claims that the mandamus/*Kavanau* adjustment remedy is inadequate because it requires the landlord to recover compensation from tenants rather than from the municipality. According to Carson Harbor, the "tenants may have moved, died or simply be unable to afford increases intended to make up for the government's past confiscatory rates." Regardless of the merits of this argument, it is also speculative at this stage and thus not ripe for decision. Carson Harbor has not shown that it would be precluded from obtaining damages from the municipality in the event that the mandamus/*Kavanau* adjustment remedy does prove to be

(continued...)

dismissal of Carson Harbor's regulatory takings claim as unripe.[6]

AFFIRMED.

O'SCANNLAIN, Circuit Judge, concurring specially.

Because Carson Harbor has made no effort to seek compensation for an alleged taking through a writ of mandamus and *Kavanau* adjustment, I agree that its regulatory takings claim must be dismissed as unripe. Any analysis of the California procedures in this case would necessarily be speculative. But I write separately to express my concern that California's procedures may not provide "just compensation" because the burden of compensation falls not on the government as the representative of the benefitting general public, but on a select group of future tenants.

The Supreme Court has repeatedly explained the central purpose of the Takings Clause: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19, 121 S.Ct. 2448, 150 L.Ed.2d 592

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[5] (...continued)
inadequate. *See Kavanau*, 66 Cal.Rptr.2d 672, 941 P.2d at 867; *Galland*, 103 Cal.Rptr.2d 711, 16 P.3d at 145.

[6] Because we affirm the dismissal of Carson Harbor's regulatory takings claim on ripeness grounds, we need not address the City's alternative argument that res judicata also justifies the dismissal.

(2001) (citing *Armstrong* to illustrate "the purpose of the Takings Clause"); *Eastern Enters. v. Apfel*, 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (plurality op.) (citing *Armstrong* as expressing "the aim of the [Just Compensation] Clause"); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (citing *Armstrong* for "[t]his basic understanding of the [Fifth] Amendment"); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (citing *Armstrong* in discussing the "factors that have shaped the jurisprudence of the Fifth Amendment"). The clear import of this central principle of takings law, and of the language of the Fifth Amendment itself, is that those whose property has been taken for public use must be compensated by the general public through the government. The Fifth Amendment is therefore violated when government attempts to lay the general public's burden of just compensation on third parties.

Although the Court has wrestled with many issues in its extensive takings jurisprudence—most notably, the intricate question of regulatory takings—it has invariably operated under the assumption that the government is the entity charged with paying just compensation. *See, e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed.2d 517 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner[.]") (citation omitted); *First English*, 482 U.S. at 319, 107 S. Ct. 2378 ("Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period."); *id.* at 321, 107 S. Ct. 2378 ([N]o subsequent action by the government can relieve it of the duty to provide compensation for the period during which the

taking was effective."); *Kaiser Aetna v. United States*, 444 U.S. 164, 180, 100 S. Ct. 383, 62 L. Ed.2d 332 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay compensation."). Together, these cases stand for a clear proposition: once the government executes a taking, the Constitution does not permit it to shift the public's burden of just compensation to third parties. When property is taken for public use under the Fifth Amendment, the public—and not specific individuals or groups at the order of the government—must pay.

If Carson Harbor were to establish that it had suffered a regulatory taking, a *Kavanau* adjustment would provide that future renters alone compensate Carson Harbor in the form of increased rents. Thus, future tenants—some of whom may not have even received the benefit of the earlier confiscatory rates—would be forced to pay for the rental review board's taking of property for public use. I seriously doubt that such outcome would amount to the "just compensation" demanded by the Fifth Amendment, for it violates the principle that compensation must be just both to the deprived property owner and the taking public. *See United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S. Ct. 547, 94 L. Ed. 707 (1950) ("[T]he dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to *the public that must pay the bill*?") (emphasis added).

Because California's recently altered procedures were not tested in this case, however, consideration of such a weighty but hitherto unexplored issue must be deferred to another occasion, when it is squarely presented for our review.

Appendix B-1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 01-4799 RJK

CARSON HARBOR VILLAGE, LTD., a California Limited Partnership dba Carson Harbor Village Mobilehome Park, Plaintiff v. CITY OF CARSON, a municipal corporation; THE CITY OF CARSON MOBILEHOME PARK RENTAL REVIEW BOARD, Defendants.	ORDER RE DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE OR IN THE ALTERNATIVE FOR ABSTENTION Filed June 11, 2002 Entered June 12, 2002

After the hearing on January 14, 2002, the Court took under submission the Motion to Dismiss Complaint Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure or in the Alternative, for Abstention filed by Defendants City of Carson (the "City") and City of Carson Mobilehome Park Rental Review Board (the "Board") (collectively, "Defendants"). After considering the papers filed by the parties, the case file and argument of counsel, the Court GRANTS the motion to dismiss.

Appendix B-2

I. BACKGROUND

This dispute concerns the application of the City's rent control laws to a mobilehome park. Plaintiff Carson Harbor Village, Ltd. owns a 420-space, 70-acre resort-style mobilehome park (the "Park") in the City. (Compl., ¶ 9.) The Park represents approximately 17 percent of the total mobilehome rental housing in the City. (Id., ¶ 11.)

Pursuant to the City's Mobilehome Space Rent Control Ordinance (the "Ordinance") and related guidelines, mobilehome park spaces are subject to a ceiling on rent levels. (See id., ¶¶ 12, 54, 55.) The Ordinance does not provide for automatic rent increases for changed circumstance such as increased costs of operation. (Id., ¶ 12.) Nor does the Ordinance provide for an automatic rent increase to account for inflation. (Id.) Instead, a property owner seeking a rent adjustment above the ceiling must submit a rent increase application to the Board. (Id., ¶ 14.)[1] The Ordinance requires the Board to consider a list of eleven enumerated but non-exclusive factors when reviewing rent increase applications and grant "'such rent increase as it determines to be just, fair and reasonable.'" (Id., ¶ 57.) Those factors include changes in the Consumer Price Index, the rent lawfully charged for comparable mobilehome spaces in the City, length of time since the last rent increase, relevant capital improvements, changes in property taxes, and changes in reasonable operating expenses. (See Defendants' Req. for Judicial Notice, Ex. A [the Ordinance], § 4704(g).)

The parties here have a long and tortuous history. Over the past twenty years, the parties have litigated both the facial constitutionality of the Ordinance and various as-applied

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[1] The Board members are appointed by the elected members of the City Council. (Id., ¶ 10.)

challenges raised by Plaintiff in state and federal courts. See, e.g., Carson Mobilehome Park Owner's Ass'n v. City of Carson, 35 Cal.3d 184 (1983); Carson Harbor Village v. City of Carson, 37 F.3d 468 (9th Cir. 1994); August 1, 2000 Order Granting Defendants' Motion for Judgment on the Pleadings in Carson Harbor Village Mobilehome Park v. City of Carson, Case No. 99-12530-DDP (C.D. Cal.).[2] All of those lawsuits have resulted in final judgments adverse to Plaintiff.

The claims in this case arise out of Defendants' treatment of Plaintiff's applications for rent increases submitted in June 2000 and April 2001. In June 2000, Plaintiff filed an application seeking rent increases ranging from $222.65 to $240.73 per month for 407 of the 420 spaces in the Park. (Defendants' Req. for Judicial Notice, Ex. L at 1.). The application is based on the Park's 1999 operating expenses and income. (Id. at 3; see Compl., ¶ 17.) Plaintiff alleges that it sought the increase "so that the fair rate of return in 1999 would equal the fair rate of return at the inception of rent control in constant dollars." (Compl., ¶ 17.) After a hearing on February 29, 2001, the Board granted, in part, Plaintiff's application (the "February 2001 decision"). (Id., ¶¶ 19-20.) The Board approved a $14.29 per space per month rent increase. (See id., ¶¶ 20-21.)

Plaintiff alleges that the Board misinterpreted, misapplied and otherwise failed to follow the Ordinance in approving only a $14.29 increase per space. (Id., ¶¶ 20, 51.) Plaintiff asserts that the Board's improper application disallowed hundreds of thousands of dollars of the Park's legitimately incurred operating expenses. (Id.) As a result, Plaintiff alleges, the Board inflated Plaintiff's 1999 net operating income, the net

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[2] Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of these orders and all other documents attached to Defendants' Request for Judicial Notice filed on July 25, 2001.

effect of which "is that Plaintiff's fair rate of return in constant dollars is materially and substantially below the fair rate of return at the inception of [the] Ordinance." (Id., ¶¶ 20, 21.) Thus, Plaintiff claims that the Ordinance, "as applied, totally destroyed Plaintiff's reasonable investment-backed expectations." (Id.)

In April, 2001, Plaintiff submitted a second application seeking a rent increase (or surcharge) to address the "regulatory lag" in obtaining the $14.29 rent increase. (Id. at ¶ 23.) Due to state law notice requirements, Plaintiffs could not impose the $14.29 rent increase until June 1, 2001. (Id.) Plaintiff claims that it is entitled to receive, at a minimum, "the City-determined fair rate of return from the date the City determined Plaintiff was entitled to it in January 1999 through June 1, 2001." (Id.) Specifically, the April 2001 application sought $295,657.01 in regulatory lag rents, attorney's fees and costs incurred in obtaining the City's approval of the rent increase. (Id.) Plaintiff alleges that the City Attorney, operating on behalf of the City, improperly refused to process this application. (Id.)

On May 29, 2001, Plaintiff filed a complaint asserting eight counts.[3] The federal counts are: (1) deprivation of Plaintiff's constitutional rights in violation of 42 U.S.C. § 1983; (2) as-applied regulatory taking of property by way of the February 2001 decision; (3) as-applied substantive due process violation by way of the February 2001 decision; (4) as-applied procedural due process violation by way of the February 2001 decision; (5) as-applied procedural due process violation by way of the City's refusal to process and hear the April 2001 application; (6) as-applied regulatory taking by way of the City's refusal to process and hear the April 2001 application;

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[3] The complaint uses the word "count" in lieu of "claim." The Court shall use "count" and "claim" interchangeably.

and (7) as-applied equal protection violation by way of the February 2001 decision. Plaintiff's single state count seeks a writ of administrative mandamus pursuant to California Code of Civil Procedure section 1094.5.

On July 25, 2001, Defendants filed their motion to dismiss for lack of subject matter jurisdiction or failure to state a claim. In the alternative, Defendants move for abstention. Plaintiff filed an opposition on October 5, 2001, and Defendants filed their reply on October 22, 2001. Defendants' motion was heard on January 14, 2002.

II. DISCUSSION

A. Applicable Legal Standards

1. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of subject matter jurisdiction must be considered before other challenges because the federal court must find jurisdiction before considering the merits of the case. 2 James Wm. Moore, et al., Moore's Federal Practice § 12.30[1]. The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. See Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995).

A Rule 12(b)(1) motion may be used to challenge two different types of defects: defects in pleading (or "facial attacks") and defects in fact. Moore's Federal Practice § 12.30[4]. When reviewing a facial attack, the Court accepts the allegations in the complaint as true and examines only whether the allegations are sufficient to show that the federal court has jurisdiction over the matter of the case. See id. On

the other hand, when reviewing a factual challenge, the allegations of the complaint are not presumed to be truthful, and the Court is not restricted to the face of the pleadings. See id., McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). The Court may review any evidence, such as declarations, documents and testimony, to resolve any factual disputes concerning jurisdiction. See id.

2. Motion to Dismiss for Failure to State a Claim

A motion to dismiss pursuant to Rule 12(b)(6) tests only the legal sufficiency of the claims asserted in the complaint. See Fed. R. Civ. P. 12(b)(6). The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Circ. 1981).

In ruling on a Rule 12(b)(6) motion, the court generally cannot consider material outside the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider exhibits submitted with the complaint and documents "whose contents are alleged in [the] complaint and whose authenticity no party questions." Id. at 453-54. The court may also consider matters subject to judicial notice pursuant to Federal Rule of Evidence 201. Mir, M.D. v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988).

B. Analysis

1. Count Three: Substantive Due Process Violation

Plaintiff alleges that the Ordinance as applied "violates Plaintiff's substantive due process rights by being an arbitrary, capricious and unreasonable exercise of Defendants' police powers." (Compl., ¶ 32.) Defendants argue ~~that under~~ Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc) and its progeny, Plaintiff is barred from bringing a substantive due process claim because the underlying allegations implicate the Fifth Amendment's Takings Clause. The Court agrees.

"Where an Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)) (internal quotations omitted); accord United States v. Lanier, 520 U.S. 259, 272 n.7 ("Graham . . . requires that if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision not under the rubric of substantive due process"). Thus, where the challenged governmental conduct is regulated by the Fifth Amendment's Takings Clause, the conduct must be analyzed under the Takings Clause and the substantive due process claim is barred. Armendariz, 75 F.3d at 1319-24 (holding that the Graham rule precludes plaintiffs' substantive due process claim where that claim challenges the same conduct as any potential takings claim); Buckles v. King County, 191 F.3d 1127, 1117 (9th Cir. 1999) (affirming dismissal of the plaintiffs' substantive due process claim challenging the county's land use decision under Armendariz); Marci v. King County, 126 F.3d 1125, 1128 (affirming dismissal of substantive due process claim where the

alleged injury sounds like a takings claim). This rule reflects the principal that "the substantive due process clause must be expanded only with the greatest care and that its protection is primarily reserved for liberties deeply rooted in this Nation's history and tradition." Macri, 126 F.3d at 1128 (internal quotations omitted). It was precisely for this reason that this Court previously precluded Plaintiff from proceeding on a substantive due process claim in a prior action against Defendants. (See Defendants' Req. for Judicial Notice, Ex. J [August 1, 2000 Order by Hon. Dean D. Pregerson)] at 5-7.)

Plaintiff now attempts to distinguish Armendariz by arguing that the current substantive due process claim is "a claim that the City abused its power by exerting grave unfairness in the discharge of its duties to administer the rent control regulation." (Opp. at 23.) Plaintiff contends that such a claim is "separate from a claim that fair return has been confiscated." (Id.) Plaintiff cites Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951 (9th Cir. 1991), vacated in part on other grounds, 987 F.2d 662 (9th Cir. 1993), and Galland v. City of Clovis, 23 Cal. 4th 1003 (2001), in support of its argument. Plaintiff's argument is unavailing.

The Ninth Circuit has rejected similar substantive due process claims based on allegations that the government abused its power in the discharge of its duty to administer various land control regulations. See, e.g., Armendariz, 75 F.3d at 1319-20 (not allowing substantive due process claim premised on allegation that the defendants conducted sweeps of the plaintiffs' low-income housing units and closed the plaintiffs' properties for no legitimate governmental purpose); Buckles, 191 F.3d at 1137-38 (not allowing substantive due process claim premised on allegation that the plaintiffs were victims of an arbitrary and unreasonable zoning change whereby their property was singled out and zoned for a use classification totally different and incompatible with the classification of

surrounding land). The Court sees no distinction between such claims and a claim that "fair return has been confiscated" under Armendariz.

Moreover, the heart of Plaintiff's substantive due process claim lies in Plaintiff's allegation that "the City in an arbitrary, capricious and unreasonable exercise of it's police power excluded from legitimate operating expenses of the Park hundreds of thousands of dollars in operating expenses," which resulted in an "increase on paper [to] Plaintiff's 'perceived' fair rate of return" and caused Plaintiff to receive less of a rent increase than that to which it was entitled. (Comp., ¶¶ 34-35.)[4] Plaintiff's substantive due process claim is substantively indistinguishable from Plaintiff's regulatory takings claim, which expressly challenges Defendants' *application* of the Ordinance. Plaintiff "cannot sidestep Armendariz by re-characterizing their claim as lying . . . in substantive due process." Macri, 126 F.3d at 1129.

Plaintiff's reliance on Sierra Lake and Galland is misplaced. First, Sierra Lake, to the extent that it permitted a substantive due process claim under the facts of that case, is no longer good law after Armendariz. Indeed, Armendariz expressly overrules Sinaloa Lake Owners Ass'n v. Simi Valley, 882 F.2d 1398 (9th Cir. 1989) (as amended),[5] the authority

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[4] The remaining allegations purport to identify the facts that support Plaintiff's claim that the City's February 2001 decision was arbitrary, capricious and unreasonable. (See id.) To the extent that Plaintiff's claim rests in part on allegations that implicate procedural due process considerations (e.g., complaint that Plaintiff was unable to confront witnesses), the claim must be analyzed as a procedural due process claim rather than a substantive due process claim.

[5] In Sinaloa Lake, property owners sued the municipal defendants under 42 U.S.C. § 1983, alleging that the defendants' actions in

(continued...)

upon which the Sierra Lake court relied in permitting the substantive due process claim. Armendariz, 75 F.3d at 1235-36; see Sierra Lake, 938 F.2d at 957-58 (quoting Sinoloa Lake, 882 F.2d at 1407).

Second, the Court declines to follow the California Supreme Court's recent decision in Galland to the extent that it purportedly supports Plaintiff's argument that the substantive due process claim should survive.[6] The Galland court failed to address whether the challenged actions were covered by a specific constitutional provision before reaching the conclusion that they implicated the more generalized notion of substantive

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[5] (...continued)
breaching the owners' dam and draining their lake amounted to a taking of their property without just compensation, as well as a violation of their substantive and procedural due process rights. 882 F.2d at 1401, 1404, 1407. The court rejected the takings claim due to the plaintiffs' failure to exhaust their state remedies (id. at 1401-04) and held that the Fourth Amendment claim was "in fact, a taking claim which [was] property asserted under the fifth amendment" and, therefore, was also unripe (id. at 1411). With respect to the substantive due process claim, the court concluded that the plaintiffs had properly stated a claim upon which relief may be granted. Id. at 1410 (the "allegations paint a picture of government officials bent on destroying the dam for no legitimate reason and determined to conceal that decision until the last possible moment to prevent plaintiffs from taking advantage of available legal processes").

[6] In Galland, the plaintiffs alleged, inter alia, that they were "damaged in the amount of $247,885 for costs incurred as a result of the arbitrary and unreasonable administrative proceedings." 24 Cal. 4th at 1030. The California Supreme Court determined that this claim should be characterized as "a substantive, rather than . . . a procedural, due process claim because "the source of their injury was . . . the fact that [the city] made demands on them as a condition of obtaining a rent increase that, in addition to being costly, were intrinsically arbitrary and irrational." Id.

due process. See 24 Cal. 4th at 1030-40. Indeed, the lengthy opinion makes no reference to the principle espoused in Graham. Moreover, the court relied solely on either state cases, post-Graham cases from other circuits or pre-Armendariz cases from the Ninth Circuit to support its conclusion that the municipal defendants' egregious conduct in a land use regulatory dispute amounting to a "deliberate flouting of the law" violated the plaintiff's right to substantive due process. See id. at 1035-36.

In sum, the Court holds that Plaintiff is precluded from asserting a substantive due process claim in this case. Accordingly, the Court grants Defendants' motion to dismiss the substantive due process claim.

2. Counts Two & Six: Regulatory Takings

Plaintiff alleges that the Ordinance, as applied to Plaintiff by way of the February 2001 decision and the subsequent refusal to hear the April 2001 "regulatory lag" application, results in impermissible takings. (Compl., ¶¶ 27, 44.) Defendants argue that the Court lacks subject matter jurisdiction over the takings claims on the ground that they are not ripe.

It is well established that a regulatory takings claim is not ripe for adjudication until the two prong test set forth in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 186 (1986), has been satisfied. First, the plaintiff must obtain a "final decision" regarding the application of the challenged government regulation to the plaintiff's property. Williamson, 473 U.S. at 186, 194-95. Second, the plaintiff must pursue state remedies for just compensation, if adequate state procedures are available. Id.; see Macri, 126 F.3d at 1129. Defendants do not challenge Plaintiff's allegation that the "final decision" prong has been

satisfied. At issue is whether Plaintiff has satisfied the second prong of the test. Defendants argue that Plaintiff failed to utilize available state compensation remedies before filing this lawsuit.

A landowner may seek just compensation for an as-applied regulatory taking of property by bringing an "inverse condemnation" action in state court. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 689 (9th Cir. 1993). Plaintiff concedes that it did not bring such an action in state court before filing this action. However, Plaintiff argues that it need not and could not bring such an action because *at the time* Defendants rendered their final decisions, California did *not* provide a remedy of just compensation for regulatory takings in the rent control context. Plaintiff relies again on Galland and another California Supreme Court decision, Kavanau v. Santa Monica Rent Control Board, 16 Cal. 4th 761 (1997), in support of its assertion that "a landlord may not obtain inverse condemnation damages against a government agency for imposing confiscatory rent ceilings on the landlord." (Opp. at 15-16; see Compl., ¶ 30 (alleging that the state courts "do not provide an inverse condemnation damages remedy" for the challenged decisions in this case because under Kavanau and Galland, California "preclude[s] a claim for inverse condemnation damages and claims under 42 U.S.C. § 1983 due to the operation of rent control").) Plaintiff urges that under the circumstances, the Court should follow Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989) (holding that property owners' action was ripe for decision where California law provided no remedy for inverse condemnation at time of alleged taking), and similarly conclude that the regulatory takings claims here are ripe for adjudication.

Plaintiff's reliance on Kavanau and Galland is misplaced. Plaintiff either misreads or mis-characterizes the holdings of the two cases. "California [courts] ha[ve] recognized inverse

condemnation claims based on as-applied regulatory takings since the Supreme Court decided First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (holding that California's denial of compensation for inverse condemnation claims based on regulatory takings was unconstitutional)." Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 686 (9th Cir. 1993) (parenthetical in the original); accord Hoehne, 879 F.2d at 533-34. Prior to that time, a landowner was limited to seeking declaratory relief or mandamus to invalidate the offending regulation. See Hoehne, 879 F.2d at 533-34 (discussing California law before First English because "the appropriate point for determining the adequacy of state compensation procedures is at the time the alleged taking occurs"). Contrary to Plaintiff's assertion, neither Kavanau nor Galland purports to change over a decade of jurisprudence by holding state law no longer provides a compensation remedy for a landlord in Plaintiff's position. The Court finds nothing in the language of those decisions to support Plaintiff's interpretation.[7] Cf. Santa Monica Beach, Ltd. v. Superior Court, 19 Cal. 4th 952 (1999) (post Kavanau decision addressing the merits of the rent controlled property owner's inverse condemnation claim; no suggestion that state

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[7] The Kavanau court merely held that no actionable takings occurred under the facts of that case. See 16 Cal. 4th at 783-786 (dismissing the inverse condemnation claim for failure to state a claim and concluding that where, as here, a due process violation "is the sole basis" for a potential takings clause violation, and a remedy for the due process violation (via future rent adjustments) is available and adequate, that remedy provides sufficient compensation to satisfy the takings clause). And the Clovis court did not even address a takings claim. The appeal concerned only the landowner's § 1983 claim premised on due process violations. See 24 Cal. 4th at 1019, 1023 (noting that the trial court dismissed the inverse condemnation claim but awarded damages to the plaintiffs on their § 1983 claim, the court of appeals affirmed and the defendant appealed).

law no longer permits the recovery of compensation for a regulatory taking).

In sum, state court compensation remedies are available, but Plaintiff did not pursue such remedies before filing this action. Because Plaintiff's as-applied regulatory takings claims are not ripe, the Court lacks subject matter jurisdiction to hear these claims.

3. Counts Four and Five: Procedural Due Process Violations

In Count Four, Plaintiff alleges that the procedure by which the Board reached its February 2001 decision constitutes a violation of Plaintiff's right to procedural due process as guaranteed by the Fourteenth Amendment. (See Compl., ¶¶ 36-38.) In Count Five, Plaintiff alleges that Defendants' refusal to process Plaintiff's April 2001 application violates Plaintiff's right to procedural due process. (See id., ¶¶ 39-42.) Defendants raise several arguments in support of their motion to dismiss these claims. The Court addresses only the relevant arguments below.

Preliminarily, the Court rejects Defendants' argument that Armendariz, Macri and Buckles require the Court to disregard the "procedural due process label" (as it must disregard the "substantive due process" label) and treat these claims as takings claims. (Motion at 10-11.)[8] Macri and Buckles only rejected the property owners' attempt to escape the application of Armendariz by re-characterizing their takings claims as *substantive* due process claims. See Macri 126 F.3d at 1129; Buckles, 191 F.3d at 1137. The Ninth Circuit has not extended

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[8] Defendants raise the same argument with respect to Plaintiff's equal protection claim. For the same reason stated herein, the Court rejects that argument.

this analysis to all constitutional claims that arise out of the application of a land use regulation. Cf. Armendariz, 75 F.3d at 1316 (en banc court noting that it does not revisit the three-judge panel's ruling that the plaintiffs have stated a claim for procedural due process violations and affirming the district court's denial of the defendants' motions for summary judgment on the plaintiffs' equal protection claim).

Next, Defendants argue that Plaintiff has failed to state a claim for a procedural due process violation because Plaintiff does not have a protected property interest in the requested rent increase. The Court agrees.

To prevail on a procedural due process claim, a plaintiff must satisfy a two part test. The plaintiff must first establish that "the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'" Ingraham v. Wright, 430 U.S. 641, 673 (1977). "[I]f protected interests are implicated," the plaintiff must then show that the state deprived her of that interest without "due process of law." Id. Here, Plaintiff has failed to meet the first part of the test.[9]

The party claiming a property interest under the Fourteenth Amendment "must have *more* than a unilateral expectation of it." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (emphasis added). He must have "a legitimate claim of entitlement to it." Id.; accord Bateson v. Geisse, 857 F.2d 1300, 1305 (9th Cir. 1988). Property interests "are not created by the Constitution." Roth, 408 U.S. at 577. Instead, property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of

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[9] Therefore, the Court need not reach the second part of the test.

entitlement to those benefits." Id. Thus, for example, the Ninth Circuit in Bateson v. Geiss examined the applicable municipal ordinance to determine whether it created an entitlement to approval of the proposed minor plat (and issuance of a building permit) when evaluating the property owner's procedural due process claim against city and city council members who had refused to approve his minor plat. 857 F.2d at 1305. Because the ordinance at issue failed to set "any significant substantive restrictions on the City Council's powers" to approve or disapprove minor plat applications, the Bateson court concluded that the property owner did not have a legitimate claim of entitlement to approval of his proposed minor plat application. Id.

In this case, Plaintiff has failed to identify any source of law that purports to support Plaintiff's claim of *entitlement* to the requested rent increases. Indeed, Plaintiff's opposition does not even address this argument. (See Opp. at 21-22.) Nevertheless, the Court examines the Ordinance to determine whether it gives rise to a protected property interest. Like the ordinance in Bateson, the Ordinance does not set any significant *substantive* restrictions on the Board's powers to approve, conditionally approve or reject a rent control application. (See Defendants' Req. for Judicial Notice, Ex. A.) Whether a rent application should be approved or rejected is left to the broad discretion of the Board. (See id. at § 4704(f)(3) ("The Board *may approve* the rent increase requested, approve a modified rent increase or deny the application pursuant to the standards established by subsections (g) and (h) of this section . . ."); § 4704(g) ("The Board shall grant such increases *as it determines to be fair, just and reasonable*" after considering certain non-exhaustive factors) (emphasis added).)

Consequently, the Court concludes that Plaintiff does not have a legitimate claim of entitlement to approval of its two rent adjustment applications. Because Plaintiff does not have

a protected property interest in the requested rent increases, Plaintiff's procedural due process claims fail.

4. Count Seven: Equal Protection Violation

Plaintiff alleges that "[o]ther regulated businesses in the City are authorized and allowed to adjust costs and returns by the effects of inflation" whereas the Ordinance as applied "arbitrarily imposes a restrictive formula that penalizes Plaintiff for the effects of inflation." (Comp., ¶ 46.) Plaintiff asserts that "[t]here is no rational basis for distinguishing between those two classes of regulated businesses and such a classification is not rationally related to furthering" the Ordinance's "purported public purpose." (Id.) As a result, Plaintiff alleges that the Ordinance, as applied to Plaintiff, violated Plaintiff's constitutional right to equal protection. (Id.) Defendants argue, inter alia, that Plaintiff has failed to state a claim upon which relief may be granted.

The Fourteenth Amendment guarantees that "'no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike.'" Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). "[S]tate action that does not implicate a fundamental right or a suspect classification passes constitutional muster under the equal protection clause so long as it bears a rational relation to a legitimate state interest." Armendariz, 75 F.3d at 1326. The "'rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary.'" Id. (quoting Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990) (as amended)).

Accepting as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, the

Court concludes that Plaintiff's equal protection claim fails to state a claim upon which relief may be granted. The complaint alleges in a conclusory fashion that "[o]ther regulated businesses in the City" are allowed "to adjust costs and returns by the effects of inflation" when Plaintiff was not. (Compl., ¶ 46.) The complaint fails to identify the "other" businesses and alleges no facts which, if true, supports this conclusory allegation. See Western Mining Council v. Watt, 643 F.2d at 624 (on a Rule 12(b)(6) motion, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations); see also Sherman v. Yakahi, 549 F.2d 1287, 1289-90 (9th Cir. 1977) (holding a pleading fails to state a claim under the Civil Rights Act if the allegations are mere conclusions). The complaint also fails to allege that the unnamed "other regulated businesses" are similarly situated, i.e., businesses also subject to the Ordinance or, at a minimum, some other rent or price control regulation. That persons similarly situated received different treatment is a requisite element of a constitutional equal protection claim. See Lee, 250 F.3d at 686; see also Village of Willowbrook v. Olech, 528 U.S. 562, 563, 565 (2000) (holding the plaintiff could assert an equal protection claim where the complaint alleges that the Village intentionally demanded a 33-foot easement from the plaintiff as a condition of connecting her property to the municipal water supply when the Village required only a 15-foot easement from other "similarly situated property owners," i.e. owners seeking access to the same water supply). Because Plaintiff has failed to allege sufficient facts, the equal protection claim fails.

5. Count One: Violation of 42 U.S.C. § 1983

Plaintiff's § 1983 claim is premised upon the alleged deprivation of constitutional rights as set forth in Counts Two through Seven. In light of the Court's conclusions above,

Plaintiff does not have a viable § 1983 claim. Therefore, the Court grants Defendants' motion to dismiss this claim.

6. Count Eight: Supplemental State Petition for Writ of Administrative Mandamus

In Count Eight, Plaintiff seeks a writ of mandate under California Code of Civil Procedure section 1094.5 directing the Board to vacate its February 2001 decision and issue a different decision granting a $52.63 per space per month. (See Compl. at 25 [prayer for relief].) Having concluded herein that dismissal of all federal claims is warranted, the Court declines to exercise supplemental jurisdiction over the remaining state claim. See 28 U.S.C. § 1367(c)(3) (the district court "may decline to exercise supplemental jurisdiction over a [supplemental state] claim" if "the district court has dismissed all claims over which it has original jurisdiction").

III. DISPOSITION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss.[10] The Court hereby DISMISSES Plaintiff's substantive due process claim (Count Three), procedural due process claims (Counts Four and Five), equal protection claim (Count Seven) and § 1983 claim (Count One) pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court DISMISSES Plaintiff's regulatory takings claims (Counts Two and Six) pursuant to Federal Rule of Civil Procedure 12(b)(1). The Court declines to exercise subject matter jurisdiction over

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[10] Plaintiff did not seek leave to amend the complaint in the event Defendants' motion was granted.

the supplemental state claim (Count Eight) and DISMISSES this claim pursuant to 28 U.S.C. § 1367(c)(3). The Court need not reach Defendants' alternative motion for abstention.

IT IS SO ORDERED.

DATED: June 11, 2002

/s/
ROBERT J. KELLEHER
United States District Judge

Appendix C-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARSON HARBOR VILLAGE, LTD., a Limited Partnership dba Carson Harbor Village Mobile Home Park,	)	No. 02-56213
	)	D.C. No. CV-01-04799-RJK
Plaintiff-Appellant,	)	ORDER
v.	)	Filed Mar 22, 2004
CITY OF CARSON, a Municipal Corporation; CARSON CITY MOBILEHOME PARK RENTALREVIEW BOARD,	)	
Defendants-Appellees,	)	
and,	)	
CARSON HARBOR VILLAGE MOBILEHOME PARK HOMEOWNERS ASSOCIATION, Real Party in Interest,	)	
Defendant.	)	

BEFORE: REINHARDT; O'SCANNLAIN and FISHER, Circuit Judges.

The panel judges have voted to deny appellant's petition for panel rehearing. Judges Reinhardt and Fisher have voted to deny the petition for rehearing en banc. Judge O'Scannlain voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and for rehearing en banc, filed February 17, 2004, is DENIED.

CHAPTER 7
MOBILEHOME SPACE RENT CONTROL

§ 4700 **Short Title.**

Chapter 7 of Article IV of the Carson Municipal Code may be cited as the "Mobilehome Space Rent Control Ordinance" of the City of Carson. (Ord. 79-485U)

§ 4701 **Definitions.**

For the purposes of this Chapter, the following words, terms and phrases shall be defined as follows:

(a) "Board" shall mean the Mobilehome Park Rental Review Board of the City of Carson.

(b) "Camping trailer" shall mean a vehicular portable unit mounted on wheels and constructed with collapsible partial sidewalls which fold for towing by another vehicle and unfold for occupancy, and designed for human habitation for recreational or emergency occupancy.

(c) "Capital improvement" shall mean improvements to a park, major refurbishment of a park and rehabilitation of a park which involve more than ordinary maintenance.

(d) "Department" shall mean the Community Development Department of the City of Carson.

(e) "Homeowner" shall mean an owner of a mobilehome in a mobilehome park in the City.

(f) "Mobilehome" shall mean a vehicle, designed or used for human habitation, including a camping trailer, travel trailer, motor home and slide-in camper, when used as the principal place of habitation for the occupants thereof.

(g) "Mobilehome space" shall mean the site within a mobilehome park intended, designed, or used for the location or accomodation of a mobilehome and any accessory structures or appurtenances attached thereto or used in conjunction therewith.

(h) "Motorhome" shall mean a vehicular unit built on or permanently attached to a self-propelled motor vehicle chassis,

chassis cab or van, which becomes an integral part of the completed vehicle, designed for human habitation for recreational or emergency occupancy.

(i) "Park Owner" shall mean an owner or operator of a mobilehome park or a person authorized to act on the owner's behalf in operating the park.

(j) "Rehabilitation" work shall mean any renovation or repair work completed on or in a mobilehome park which was performed in order to comply with the direction or order of a public agency, or to repair damage resulting from fire, earthquake, or other casualty.

(k) "Rent" shall mean the consideration paid for the use or occupancy of a mobilehome space.

(l) "Slide-in camper" shall mean a portable unit, consisting of a roof, floor and sides, designed to be loaded onto and unloaded from the bed of a pickup truck, and designed for human habitation for recreational or emergency occupancy and shall include a truck camper.

(m) "Tenancy" shall mean the right of a Homeowner to use or occupy a mobilehome space in a park in the City.

(n) "Resident Homeowner" shall mean a Homeowner who has a tenancy in the park and resides in the mobilehome in the park.

(o) "Travel trailer" shall mean a portable unit, mounted on wheels, of such size and weight as not to require special highway movement permits when drawn by a motor vehicle, and for human habitation for recreational or emergency occupancy. (Ord. 79-485U; Ord. 83-659; Ord. 86-768, § 1; Ord. 98-1130, § 2)

§ 4702 **Mobilehome Park Rental Review Board.** (section amended)

(a) The Mobilehome Park Rental Review Board is hereby established and shall consist of seven (7) members. In order to provide varied and balanced backgrounds, two (2) members shall be Resident Homeowners, two (2) members shall be Park Owners and three (3) members shall be At Large Members and

shall be residents of the City who are not Homeowners, Park Owners, landlords, property managers or tenants in multifamily housing. There shall also be three (3) Alternate Members; one (1) Alternate shall be a Resident Homeowner, one (1) Alternate shall be a Park Owner and one (1) Alternate shall be At Large. The terms of the Board Members shall be two (2) years and a Board Member shall continue to serve until a successor has been appointed. The terms of Board Members appointed following adoption of this Ordinance shall expire on March 31, 1999.

Each City Councilmember shall appoint one (1) of the Resident Homeowner or Park Owner Members and lots shall be drawn to determine whether a Councilmember appoints a Resident Homeowner or Park Owner Member, provided that no Councilmember shall appoint a Resident Homeowner Member or Park Owner Member in consecutive terms and a Councilmember shall appoint a Resident Homeowner Member if his or her previous appointment was a Park Owner and vice versa. The At Large Members shall be appointed by the Resident Homeowner and Park Owner Members. The Park Owner and Resident Homeowner Members shall hold a duly noticed meeting no later than twenty (20) days after their appointment to nominate and consider selection of the At Large Members. If the Park Owner and Resident Homeowner Members are unable by majority vote to agree on the appointment of the At Large Members at that meeting, then at that meeting, the two (2) Resident Homeowner Members shall nominate two (2) At Large candidates, the two (2) Park Owner Members shall nominate two (2) At Large Candidates and the three (3) At Large Members shall be chosen by lot from among the four (4) nominated At Large Candidates.

The alternate Resident Homeowner Member and alternate Park Owner Member shall be appointed by the Mayor, subject to the approval of the City Council. The At Large Alternate shall be chosen by the Resident Homeowner and Park Owner Members by the same procedure as set forth above for selecting At Large

Members, except that if they are unable to agree by majority vote on the At Large Alternate, the Resident Homeowner Members shall nominate only one (1) candidate and the Park Owner Members shall nominate only one (1) candidate; provided however that if the At Large Members were chosen by lot, then the At Large Alternate shall be the fourth candidate nominated for an At Large Alternate position who was not selected by lot.

If a vacancy occurs in a Resident Homeowner or Park Owner position the Councilmember who appointed that Board Member, or the Mayor if it is an alternate Resident Homeowner or Park Owner position, shall make an appointment to fill the vacancy. If a vacancy occurs in the At Large Alternate position, it shall be filled by the procedure set forth above for appointing At Large Alternates. If a vacancy should occur in the office of a Councilmember or Mayor, the tenure of the Board Member or Alternate appointed by such Councilmember or Mayor shall expire when the vacancy on the City Council or in the Mayor's office has been filled, at which time the successor Councilmember or Mayor shall make the appointment to that position. All appointments to the Board shall be made in an open session of the City Council or an open meeting of the Board.

An Alternate shall serve on the Board in the absence of a member of the Board. The Alternate to be called first, if available, shall have the same qualification as to home ownership or park ownership as the absent Board Member. If the Alternate Member with the same qualification as the absent Member should be unavailable, the At Large Alternate shall be called on to serve in place of the absent Member. A resident Homeowner Alternate shall not serve in place of a Park Owner Member and a Park Owner Alternate shall not serve in place of a Resident Homeowner Member.

(b) If a member of the Board is absent from three (3) successive regular meetings without being excused by the Board, or is absent for any reason for more than six (6) regular meetings in

any twelve (12) month period, the office of such member shall be vacated and the Chair shall immediately notify the City Manager, who shall notify the City Council that said office is vacant. Upon such notification, a successor for the remainder of the term of such member shall be appointed by the appointing authority for the member whose position is vacated.
(c) The Board shall establish the time of any hearings or meetings held pursuant to this Chapter and such hearings or meetings shall be held in the City Hall as often as the Board determines to be necessary to discharge its duties hereunder.
(d) The Board shall elect one (1) of its members as the Chair and said election shall be held as soon as practicable after each new term commences or new appointments are made to the majority of the Park Owner, Resident Homeowners and At Large Members. Four (4) Board Members, counting any Alternate serving in the absence of a Board Member, shall constitute a quorum. The decisions of the Board shall be made by a majority vote, provided however, that if the Board Members and any Alternates constituting the quorum do not include an equal number of Resident Homeowner and Park Owner Members and the Resident Homeowner and Park Owner Members present and voting are not outnumbered by At Large Members, including the At Large Alternate, then four (4) affirmative votes shall be required to reach a decision on a rent adjustment application.
(e) The duties and responsibilities of the Board shall include the following:
(1) The Board shall make any recommendations to the City Council the Board deems appropriate regarding the implementation and enforcement of the provisions of this Chapter.
(2) The Board shall hear rent adjustment applications and determine whether to approve, modify, or disapprove a rent adjustment pursuant to the procedures set forth in CMC 4704.
(3) The compensation of Board members, alternates and mediator shall be determined by the City Council. (Ord. 79-

485U; Ord. 80-519, § 1; Ord. 81-582, § 1; Ord. 82-614, § 1;Ord. 88-847, § 1; Ord. 92-983, § 2; Ord. 92-988U, § § 1, 3; Ord. 92-994U, § 1; Ord. 97-1113, § 1; Ord. 97-1127U, § 1; Ord. 98-1130, § § 3-5)

§ 4703 **Base Rent.**

Except as hereinafter provided, a Park Owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on May 1, 1979. If a previously rented mobilehome space was not rented on May 1, 1979, the Park Owner shall not demand, accept, or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to May 1, 1979. If a mobilehome space is rented for the first time after May 1, 1979, the Park Owner shall not demand, accept or retain rent for said space exceeding the rent first charged for the space. No Park Owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board. Except as herein provided, a Park Owner shall not demand, accept or retain rent exceeding the rent in effect on June 1, 1983, for a mobilehome space that was not regulated by this Section prior to the amendment of this Section on June 20, 1983. If such a mobilehome space was not rented on June 1, 1983, the Park Owner shall not demand, accept or retain rent for said space exceeding the rent in effect during the last month the space was rented prior to June 1, 1983. (Ord. 79-485U; Ord. 80-504U; Ord. 83-695U, § 2; Ord. 98-1130, § 6)

§ 4704 **Permitted Rent Increases Based Upon Application Approved by the Board.**

(a) A Park Owner may file with the Department a rent increase application for one (1) or more mobilehome spaces for approval by the Board. A Park Owner, a Resident Homeowner or the Department may file an application for a rent adjustment for one (1) or more spaces pursuant to CMC 4704(h).

(b) An application for a rent adjustment pursuant to this Section shall be filed upon a form prescribed by the Department and shall be accompanied by the payment of a fee to be established by resolution of the City Council. The application shall specify the address of the mobilehome park, the space number or numbers for which rent is requested to be increased, the amount of the requested rent increase, the facts supporting the application. Supporting documentation shall be filed with the application and the applicant shall produce at the request of the Department any records, receipts, reports, or other documents that the Department may deem necessary for the Board to make its determination concerning the application. The application shall be made under penalty of perjury and supporting documents shall be certified or verified as requested by the Department.

(c) A rent increase application accompanied by the required fee shall be accepted and lodged by the Department but shall not be filed until it is substantially complete and the time periods provided by this Chapter for processing the application shall not begin to run until an application is substantially complete and filed. The Department shall determine within thirty (30) days after the lodging of an application whether said application is complete. If the Department determines that an application is not complete, it shall so notify the applicant in writing and the notice shall state what additional information is required to complete the application. An application which is substantially complete but lacks documentation to support certain claims can be processed for hearing, but any claimed expenses lacking adequate documentation shall not be allowed as operating expenses. Any application which has not been substantially completed within six (6) months of its submission to the Department shall be returned to the applicant. Thereafter, a new application and fee shall be required if the applicant wishes to apply for a rent increase.

(d) Upon receipt of a rent increase application, the Department shall mail a notice to the affected Homeowners informing them

that an application has been lodged and is being reviewed for completeness. The notice shall also state the amount of the increase being sought. Homeowners may review the application in the Department and may also obtain copies of the application upon payment of the City's copying costs. Upon determining that the application is substantially complete, the Department shall mail a notice to the applicant stating that the application is substantially complete and has been filed. At the same time, the Department shall mail a notice to the affected Homeowners stating that the application is substantially complete and informing them of the amount of the rent increase sought and that they have thirty (30) days from the date of the notice in which to submit written statements, photographs, documents, or other evidence relating to the application, to the Department. No written statements, photographs, documents, or other evidence relating to the application may be filed later than ten (10) days before the hearing on the application. All materials submitted by a Park Owner, Homeowner or any other interested party are public records, may be inspected and may be copied upon payment of the City's copying costs.

(e) The Board shall hold a public hearing on an application within sixty (60) days of the date that the application is determined to be substantially complete, except as provided in subsection (j) of this Section. Notice of the time, date and place of the hearing shall be mailed to the applicant and affected Homeowners at least fifteen (15) days prior to the hearing date. The Staff report on an application shall be provided to Board Members, and made available to the applicant, the Homeowners and their designated representatives, if any, at least five (5) days prior to the hearing.

(f) (1) At the public hearing, the applicant, affected Homeowners, their representatives and any interested person may offer any testimony that is relevant to the application. They may offer documents, written declarations, photographs or other written or documentary evidence for the first time at the hearing only if good cause is shown why such evidence

could not, with reasonable diligence, have been filed with the Department ten (10) days prior to the hearing and that the material was filed with the Department as soon as possible. Board Members and Alternates may testify at a hearing on a rent increase application only when they have recused themselves and the application involves a park in which they reside, have a financial interest or manage, or in which a parent, grandparent or siblings of the Board Member or Alternate resides.

(2) All persons testifying at the hearing shall be sworn under penalty of perjury. Formal rules of evidence shall not be applicable to the hearing.

(3) The Board may approve the rent increase requested, approve a modified rent increase or deny the application pursuant to the standards established by subsections (g) and (h) of this Section and shall adopt a written resolution setting forth its findings and decision no later than seventy-five (75) days after the application was deemed substantially complete.

(g) The Board shall grant such rent increases as it determines to be fair, just and reasonable. A rent increase is fair, just and reasonable if it protects Homeowners from excessive rent increases and allows a fair return on investment to the Park Owner. The Board shall consider the following factors and any Guidelines adopted by the City Council, as well as any other relevant factors, in making its determination and no one (1) factor shall be determinative.

(1) Changes in the Consumer Price Index for All Urban Consumers in the Los Angeles-Anaheim-Riverside Area published by the Bureau of Labor Statistics. If the Bureau of Labor Statistics subsequently changes the geographic reporting area in which the City is located, the Board shall use the most current applicable reporting area established by the Bureau.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Carson.

(3) The length of time since either the last hearing and final determination by the Board on a rent increase application or the

last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements related to the mobilehome space or spaces in the rent increase application, including such items of cost as materials, labor, interest, permit fees and other items as established by evidence and deemed relevant by the Board.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject Mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

(h) (1) The Board may provide that an increase in rent, or a portion of an increase in rent, granted by the Board be limited to the length of time necessary to allow the Park Owner to reasonably amortize the cost of a capital improvement, including interest and any costs necessary to the capital improvement, excluding attorneys' fees. Such increases shall not continue beyond the time necessary for reasonable amortization of the cost of such improvement and shall be listed separately from the base rent for a space on the monthly rent statement, invoice or bill provided to the Homeowners. When calculating general rent increases, any capital improvement rent increase shall not be included in the existing rent.

(2) If the cost of a capital improvement for which an increase was granted under this subsection is later recovered by the Park Owner from a third party before the expiration of the

amortization period approved by the Board, the Park Owner, any affected Homeowner or the Director of the Department or his designee, may file an application with the Department for the termination of the capital improvement rent increase on the ground that the Park Owner has recovered the cost of the improvement through insurance, litigation or other right of indemnity. The capital improvement rent increase shall be suspended pending determination of the application and if the application is denied the amortization period during which the increase may be collected shall be extended as necessary to allow the full amortization period originally allowed by the Board.

(3) Upon receipt of an application to terminate a capital improvement rent increase, and upon satisfactory proof of recovery of the cost of the improvement, such as, but not limited to, a court judgment or insurer's acknowledgment of coverage, the Director of the Department shall give notice of the application to the Park Owner and affected Homeowners and the capital improvement rent increase shall be terminated within fifteen (15) days unless within ten (10) days of the notice it is protested by the Park Owner on the ground that he or she has not in fact recovered the cost of the improvement. If satisfactory proof of recovery of the cost of the improvement is not submitted with the application, the Department shall give notice of that determination to the applicant, the affected Homeowners and the Park owner and the Director's decision shall become final within fifteen (15) days of the notice unless protested by the applicant or an affected Homeowner within fifteen (15) days of the notice. If a protest is filed by an affected Homeowner or the Park Owner, mailed notice shall be given to the affected Homeowners and Park Owner that the protest will be heard by the Board on a date not later than thirty (30) days after the filing of the protest. The notice shall be mailed no later than fifteen (15) days prior to the hearing and the Board shall make its decision by written resolution setting

forth its findings within forty-five (45) days after the filing of the protest. (Ord. 80-544, § 1; Ord. No. 83-655, § 1)

(i) Notice of the Board's determination on an application shall be mailed to the applicant, the Park Owner and all affected Homeowners at the mobilehome spaces designated in the application. The determination of the Board shall be final.

(j) The time in which the Board must open the hearing on an application and the time in which the Board must make any final decision may be extended with the consent of the applicant or Park Owner and may be extended without the consent of the applicant or Park Owner if the need for the extension is caused by the conduct of the applicant or the Park Owner. In the event the Board is unable to make its decision within the time limits set forth in this Chapter, including any extensions of time consented to by the applicant, the Board's inability to make a timely decision is not due to the conduct of the applicant or the Park Owner, or some cause beyond the Board's control, such as, but not limited to, fire, earthquake or flood, the Board shall at the time it grants any rent increase based on subsections (g) and (h) of this Section grant a temporary additional rent increase to the applicant to compensate the applicant for the difference between the rental income received between the time when an increase should have been granted pursuant to the time limits set forth in this Chapter and the rental income that would have been received if the increase had been timely granted.

(k) *Deleted by Ord. 98-1130.* (Ord. 79-485U; Ord. 80-544, § 1; Ord. 82-624, § § 1-4; Ord. 98-1130, § § 8-15)

§ 4705 Maximum Allowable Rent.

The maximum allowable rent ("MAR") for any mobilehome space in a park in the City is the last rent approved by the Board. Any park which has not sought approval of a rent increase from the Board by July 31, 1997 Ordinance (No. 98-1136) shall register, on a form provided by the Department, the rent for each space in the park on July 31, 1997, and the amenities and services provided to the Homeowners in the park

on that date without any charge beyond the rent in effect on that date, within thirty (30) days of the date this Ordinance (No. 98-1136) becomes effective. The rent so registered for each space shall become the MAR for that space unless that rent is challenged by a Resident Homeowner in the park within thirty (30) days after notice is sent by the Department to each Homeowner showing the rent that has been registered for each space. The challenge must be based on evidence showing that the rent registered exceeds that in effect in May of 1979 plus fifty (50) percent of the increase in the CPI since that date or exceeds the rent charged to the Resident Homeowner on July 31, 1997. Any challenge shall be submitted in writing to the Department. Upon receipt of the challenge, the Department shall notify the Park Owner that he or she has thirty (30) days in which to provide any information relevant to determining the MAR for the space or spaces for which the challenge has been filed. The Department shall set a public hearing to determine the MAR for each space for which a challenge has been filed no later than thirty (30) days after the expiration of the Park Owner's time to respond. Notice of the time, date and place of the hearing shall be mailed to the Park Owner and affected Homeowners no later than fifteen (15) days prior to the public hearing and no written or documentary evidence may be submitted later than ten (10) days prior to the hearing date. The hearing shall be held according to the provisions governing hearings on rent increase applications. The Board shall adopt a written resolution setting forth its findings and the MAR for the spaces for which a challenge was filed within fifteen (15) days after the date on which the public hearing is opened. No fee shall be charged for registering rents under this subsection or for filing a challenge to a rent or rents challenged pursuant to this subsection. (Ord. 98-1130, § 16)

§ 4706 Tenancies Not Governed by the Mobilehome Residency Law.

(a) A Resident Homeowner whose tenancy is not regulated by the provisions of the Mobilehome Residency Law (Civil Code Sections 798 through 799.6) shall not be charged a fee for anything other than rent or utilities with the exception of incidental reasonable charges for services actually rendered.

(b) A tenancy which is not subject to the provisions of the Mobilehome Residency Law (Civil Code Sections 798 through 799.6) shall not be terminated nor shall its renewal be refused, except for one (1) or more of the following reasons:

(1) Failure of the Homeowner to comply with a local ordinance or State law or regulation relating to mobilehomes within a reasonable time after the Homeowner receives a notice of noncompliance from the appropriate governmental agency.

(2) Conduct by the Homeowner, upon the mobilehome park premises, which constitutes a substantial annoyance to other Homeowners.

(3) Failure of the Homeowner to comply with reasonable rule or regulation of the mobilehome park. No act or omission of the Homeowner shall constitute such a failure to comply unless and until the Park Owner has given the Homeowner written notice of the alleged rule or regulation violation and the Homeowner has failed to adhere to the rule or regulation within seven (7) days.

(4) Nonpayment of rent, utility charges, or reasonable incidental service charges.

(5) Condemnation of the mobilehome park.

(6) Change of use of the mobilehome park, provided that:

(A) The Park Owner has complied with the provisions of Section 798.56 of the California Civil Code, Government Code Sections 65863.7 and 65863.8 and CMC 9128.21.

(B) The Park Owner gives the Homeowner written notice of the proposed change twelve (12) months or more before the date of the proposed change.

(C) The Park Owner gives each proposed Homeowner whose tenancy will commence within twelve (12) months of the proposed change, written notice thereof prior to the inception of his tenancy.

(c) Notice of termination or refusal to renew must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at least sixty (60) days prior to the termination date of the tenancy. Said notice shall state the date the tenancy terminates, the reason for the termination or refusal to renew, and the specific facts upon which the Park Owner is relying. (Ord. 79-485U; Ord. 92-965, § 11; Ord. 98-1130, § § 16, 17)

§ 4707 Refusal of Homeowner to Pay Illegal Rent.

A Homeowner may refuse to pay any rent in excess of the maximum allowable rent ("MAR") permitted by this Chapter. The fact that such unpaid rent is in excess of the MAR shall be a defense in any action brought to recover possession of a mobilehome space for nonpayment of rent or to collect the illegal rent. (Ord. 79-485U; Ord. 98-1130, § 18)

§ 4708 Remedies.

(a) Any person who demands, accepts or retains any payment of rent in violation of the provisions of this Chapter shall be liable in a civil action to the person from whom such payment is demanded, accepted or retained for damages in the sum of three (3) times the amount by which the payment or payments demanded, accepted, or retained exceed the maximum rent which could lawfully be demanded, accepted or retained together with reasonable attorneys' fees and costs as determined by the court.

(b) Any person violating any of the provisions of this Chapter shall be guilty of a misdemeanor and shall be punishable in the manner provided by CMC 1200.

(c) Code of Civil Procedure Section 1094.6 is applicable to decisions of the Mobilehome Park Rental Review Board

granting or denying rent increase applications and no legal challenge to any such decision of the Board may be brought unless it is filed within ninety (90) days of the Board's final decision, as set forth in its written resolution making findings. The Board's resolution granting or denying the increase shall state that the time within which judicial review must be sought is governed by Code of Civil Procedure Section 1094.6 and a copy of the resolution, including a certificate of mailing, shall be sent to the applicant, and to a representative of the residents of the affected mobilehome park, if one has been designated, by first class mail. (Ord. 79-485U; Ord. 94-1031, § 1)

§ 4709 City Council Review of This Chapter.

The City Council shall review the provisions of this Chapter six (6) months after the date of adoption thereof, and at any other time deemed appropriate, in order to consider the following:

(a) Whether mobilehome space rent control continues to be necessary to protect the public health, safety and welfare;

(b) Whether the implementation of the provisions of this Chapter have been adequate; and

(c) Whether the provisions of this Chapter should be amended to provide more effective regulations or to avoid unnecessary hardship. (Ord. 79-485U)

§ 4710 Lease Regulations.

No Park Owner may require, directly or indirectly, that any Homeowner or prospective Homeowner sign a lease or rental agreement that provides that it shall be exempt from local rent control or provides for space rent in excess of that permitted by this Chapter as a condition of tenancy in the park and no Park Owner may deny a tenancy to a prospective purchaser of a mobilehome in the park on the ground that the prospective purchaser will not sign such a lease or rental agreement. (Ord. 91-941U, § 1; Ord. 91-941, § 1; Ord. 92-970U, § 2; Ord. 92-970, § 2; Ord. 98-1130, § 19)

§ 4711 Utility Fees - Registration and Posting.

(a) Not less than ninety (90) days prior to imposing a separate charge for a utility service previously included in the rent pursuant to Civil Code Section 798.41, a Park Owner shall file notice thereof with the Department on a form provided by the City, which specifies the current rent for each space, the new charge to be imposed, the duration and expiration date of the separate charge if it has a limited duration or is amortized for a specified period, the rent reduction to be made simultaneously with imposition of the charge, the calculation of the new charge and rent reduction and the new MAR for each space.

(b) Not less than ninety (90) days prior to imposing, increasing, decreasing or eliminating a charge separately billed pursuant to Civil Code Section 798.49, a Park Owner shall file a notice with the Department on a form provided with the City which specifies for each space the current rent, the amount of the new charge or charge eliminated or the amount of any increase or decrease in an existing charge, the fee or assessment on which the charge or change therein is based, the basis for the amount of the charge or any change therein and the duration and expiration date of the charge if it has a limited duration or is amortized for a specified period.

(c) Within ten (10) days of executing any rental agreement or lease which is exempt from this Chapter pursuant to Civil Code Section 798.17, a Park Owner shall register that lease with the Department on a form provided by the City, which specifies the beginning and ending date of the lease and the rental rate(s) applicable during the duration of the lease, and shall attach thereto a copy of the lease.

(d) Every Park Owner shall post a copy of this Chapter in the park office or manager's office and in any clubhouse, recreation building or room, auditorium or assembly room, shall give each prospective Homeowner and Resident a copy of this Chapter before the prospective Homeowner executes any lease or rental agreement with the park and shall file a signed receipt from each new Homeowner acknowledging receipt of a copy of this

Chapter prior to execution of any lease or rental agreement with the Department within five (5) days of execution of the lease or rental agreement. (Ord. 92-970U, § 1; Ord. 92-970, § 1; Ord. 93-1000U, § 1; Ord. 93-1000, § 1; Ord. 98-1130, § 20)

CHAPTER 8
SALE AND DISPLAY OF NARCOTIC AND OTHER PARAPHERNALIA

§ 4800 Minors.

No owner, manager or proprietor in charge of any room in any place of business selling, or displaying for the purpose of sale, any device, contrivance, instrument or paraphernalia for smoking or injecting or consuming marijuana, hashish, PCP, or any controlled substance, as defined in the Health and Safety Code of the State of California (other than prescription drugs and devices to ingest or inject prescription drugs), roach clips, cigarette papers and rollers designed for the smoking of the foregoing, shall allow or permit any person under the age of eighteen (18) years to be, remain in, enter or visit such room unless such minor person is accompanied by one (1) of his or her parents, or by his or her legal guardian. (Ord. 81-578, § 1)

§ 4801 Minors - Excluded.

A person under the age of eighteen (18) years shall not be, remain in, enter or visit any room in any place used for the sale, or displaying for sale, devices, contrivances, instruments or paraphernalia for smoking or injecting marijuana, hashish, PCP, or any controlled substance (other than prescription drugs and devices to ingest or inject prescription drugs), including roach clips, and cigarette papers and rollers designed and used for smoking the foregoing, unless such person is accompanied by one (1) of his or her parents, or his or her legal guardian. (Ord. 81-578, § 1)